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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. FRANK EDWARD CORONA and IVAN EDDIE RODRIGUEZ, Defendants and Appellants.	G040869 (Super. Ct. No. RIF106832) O P I N I O N

Appeal from a judgment of the Superior Court of Riverside County, Rufus L. Yent, Judge. Affirmed.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and Appellant Frank Edward Corona.

Marcia R. Clark, under appointment by the Court of Appeal, for Defendant and Appellant Ivan Eddie Rodriguez.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Steve Oetting and Robin Derman, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Frank Edward Corona and Ivan Eddie Rodriguez were tried jointly, but with separate juries, for a series of robberies against immigrant day laborers in the Home Gardens area of Riverside County in 2002. One jury convicted Rodriguez of three counts of robbery (Pen. Code, § 211; all further unlabeled section references are to the Penal Code, unless otherwise noted), active participation in a criminal street gang (§ 186.22, subd. (a)), and possession of an assault weapon (§ 12280). The jury also found to be true allegations Rodriguez personally used a firearm in one of the robberies (§ 12022.53, subd. (b)), and that he committed the robberies for the benefit of a criminal street gang (§ 186.22, subd. (b)). The other jury convicted Corona of two counts of robbery (§ 211) and active participation in a criminal street gang (§ 186.22, subd. (a)). The jury found to be true, on the first robbery count, allegations that Corona was a principal in a crime committed for the benefit of a gang and at least one principal personally used a firearm (§ 12022.53, subds. (b) & (e)(1)), that Corona personally used a firearm (§ 12022.53, subd. (b)), and that he committed the crime for the benefit of a criminal street gang (§ 186.22, subd. (b)). The jury also found the personal firearm use and gang enhancement allegations to be true on the second robbery count against Corona. (§§ 12022.53, subd. (b); 186.22, subd. (b).) The trial court sentenced Rodriguez to 32 years and 4 months in state prison and Corona to 30 years and 8 months in state prison.

Corona contends the trial court erred in admitting preliminary hearing testimony by one of the robbery victims because the prosecutor failed to act diligently to secure the victim's appearance at trial. Corona also challenges the sufficiency of the evidence to support the gang enhancement and gang gun use allegations against him. Rodriguez argues the trial court erred in admitting against him testimony establishing

Corona committed one of the charged robberies; the trial court admitted the testimony to establish the prerequisite pattern of criminal gang activity for the gang enhancement against Rodriguez. Rodriguez also argues the trial court erred in instructing the jury to determine whether certain aggravating factors applied, if it found him guilty of the robberies. Addressing these issues in the order they arose at trial, we find none has merit. We therefore affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

Consistent with the standard of review, we set out the facts in the light most favorable to the judgment. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; see 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 364, p. 414 [“‘All of the evidence most favorable to the respondent must be accepted as true, and that unfavorable discarded as not having sufficient verity to be accepted by trier of fact’”].)

In November 2002, Jorge Cardoza came forward to tell police he had been robbed by Rodriguez and Corona multiple times. He testified concerning two of the incidents at the preliminary hearing, where he identified Rodriguez and Corona in court. Rodriguez committed the first robbery alone. According to Cardoza, Rodriguez approached him as he stood near the Home Gardens fire station, pointed a gun wrapped in a handkerchief at his right side, removed $180 from Cardoza’s pocket, and fled.

Investigating officers found graffiti near the robbery site consisting of the words, “CVLS,” “Fourth Street,” and “Huero.” Sergeant Evan Petersen of the Riverside County Sheriff’s Department explained that “CVLS” stood for Corona Varrios Locos, a criminal street gang that controlled the Home Gardens area. “Fourth Street” was another name for CVLS, and “Huero” was defendant Corona’s gang moniker. Petersen explained

a rash of robberies had plagued the Home Gardens area in the summer and fall of 2002, which the police had difficulty investigating because the victims were generally day laborers unwilling to approach law enforcement since they feared both retaliation by CVLS and deportation.

Cardoza testified at the preliminary hearing that the second robbery occurred when Rodriguez, Corona, and a young man confronted him behind a marketplace. Corona displayed a handgun and the young man had a dagger. The trio seemed to know Cardoza had just been paid his $400 weekly wages, which they demanded. Corona pushed Cardoza, and the young man grabbed the money from Cardoza. When Petersen investigated, he found the words "Huero," CVLS," and "IV" graffitied nearby.

Because Cardoza was unavailable at trial, the trial court admitted his preliminary hearing testimony after determining the prosecutor had exercised due diligence in attempting to secure Cardoza's attendance at trial.

Juan Morales contacted Sheriff's Deputy Joaquin Casanas about being robbed on November 12, 2002. Morales, however, seemed apprehensive and fearful of retaliation. He never followed up with Casanas to complete the interview.

Margarita Clark notified Casanas the next day that she witnessed the robbery of a day laborer in front of a Home Gardens liquor store on November 12, 2008. She identified Rodriguez and Corona, who she knew from the neighborhood, as two of the three men who surrounded and robbed the victim. Rodriguez kept his hand in his pocket as if he concealed a gun there; Clark knew him to carry a firearm. Clark reiterated these claims to the district attorney's investigator. At trial, however, she recanted, claiming she walked by a group in front of the liquor store and observed nothing unusual.

She admitted knowing Rodriguez and Corona were gang members and that she feared retaliation for cooperating with the police. Investigators discovered graffiti on the side of the liquor store, including, "CVLS," "Fourth Street," and Rodriguez's and Corona's monikers, "Mosca" and "Huero," respectively.

In late 2002, James Munoz went to Alice Garza's house to buy methamphetamine. He found Corona there, and the pair used methamphetamine together. Corona informed Garza he wanted to buy more methamphetamine, and when she put a half-ounce dose on the counter, worth approximately $60, Corona drew a sawed-off shotgun from beneath his sweatshirt and departed with the drugs. At trial, Munoz denied Corona used a weapon in robbing Garza. A lifelong member of the "Diablos," a subset of CVLS, Munoz denied Corona was a CVLS gang member.

Munoz testified that, in gang culture, slicing someone's face to leave a scar signifies the person is a snitch. Munoz described an incident in a holding cell during which, while awaiting trial in 2004 on a robbery charge against him, his coperpetrator in that case slashed Munoz's face and head with a razor blade. Contradicting his statements to police and to the prosecutor's investigator, Munoz denied in testimony at the present trial that the slashing incident was payback because he implicated Corona in the Garza robbery.

The prosecutor played for Rodriguez's jury a tape of Rodriguez's interview with police. Rodriguez first admitted participating only as a lookout in two robberies, including the liquor store robbery. Then he admitted holding a knife in five robberies, a gun in one robbery, and, on occasion, demanding money from victims. Finally, he admitted robbing victims as often as twice a day, estimating he committed 300 robberies. He explained he and his cohorts selected the locale in Home Gardens because they knew

it to be the area where day laborers were dropped off after work. He claimed they only committed the robberies to obtain beer money, but admitted his status within CVLS was enhanced because he participated in so many crimes.

II

DISCUSSION

A. *The Trial Court Properly Admitted Cardoza's Preliminary Hearing Testimony*

Corona contends the trial court erred in admitting Cardoza's preliminary hearing testimony because the prosecution failed to show it exercised due diligence in securing Cardoza's attendance at trial. Corona does not fault the prosecution's efforts to locate Cardoza after he left Riverside, but complains that the prosecution's failure to serve Cardoza with a trial subpoena demonstrates a lack of due diligence requiring reversal. We disagree.

"A defendant has a constitutional right to confront witnesses, but this right is not absolute. If a witness is unavailable at trial and has testified at a previous judicial proceeding against the same defendant and was subject to cross-examination by that defendant, the previous testimony may be admitted at trial. [Citations.] The constitutional right to confront witnesses mandates that, before a witness can be found unavailable, the prosecution must 'have made a good-faith effort to obtain his presence at trial.'" (*People v. Smith* (2003) 30 Cal.4th 581, 609.) A witness is unavailable if he or she is "[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process." (Evid. Code, § 240, subd. (a)(5).) The proponent of the evidence has the burden of establishing unavailability. (*People v. Cummings* (1993) 4 Cal.4th 1233,

1296.) When, as here, the facts are undisputed, we review the trial court's due diligence determination de novo. (*People v. Cromer* (2001) 24 Cal.4th 889, 900-901.)

To facilitate Cardoza's cooperation and testimony, the Riverside District Attorney obtained a visa for Cardoza, a Guatemalan native residing legally in the United States, and placed him in the county's witness protection program in December 2002. On March 4, 2004, Cardoza informed his supervising agent, District Attorney Investigator Bob Creed, that he was leaving the area and moving to Denver, Colorado. Creed attempted to explain the importance of remaining available to testify, but Cardoza rebuffed him. According to Creed, Cardoza "would not listen to reason about staying in the area and being a witness in this case." Creed drove to Cardoza's Riverside residence, but by then Cardoza had departed.

Cardoza never contacted the district attorney's office again, and failed to appear for the trial conducted in June 2007. From the time of his disappearance, the district attorney's office undertook extensive but unsuccessful efforts to locate Cardoza, including database and record checks, interviews with day laborers and migrant workers likely to encounter Cardoza, and use of internet resources for locating missing persons. The trial court found the prosecution exercised due diligence in attempting to locate Cardoza and therefore admitted his preliminary hearing testimony into evidence.

Corona takes issue with the district attorney's failure to subpoena Cardoza, but the prosecutor established there was no reason to resort to a subpoena before Cardoza's surprise announcement of his departure. The prosecutor secured Cardoza's presence at the preliminary hearing in September 2003 without a subpoena, supporting the conclusion the prosecutor reasonably believed that ensuring the continuing validity of

Cardoza's visa and his enrollment in the witness protection program were sufficient measures to keep him available.

The prosecutor had no notice before March 2004 of Cardoza's imminent departure. Absent notice, a prosecutor has no general duty to anticipate a witness's decision to flee the area to avoid testifying. (*People v. Hovey* (1988) 44 Cal.3d 543, 564 [courts cannot "properly impose upon the People an obligation to keep 'periodic tabs' on every material witness in a criminal case, for the administrative burdens of doing so would be prohibitive"].) As our Supreme Court has explained, "[I]t is unclear what effective and reasonable controls the People could impose upon a witness who plans to leave the state, or simply 'disappear,' long before a trial date is set." (*Ibid.*) Here, the trial date was continued over a nearly four-year period following the preliminary hearing and, upon Cardoza's sudden and firm announcement he was leaving, it is not clear serving a subpoena would have had any effect. Indeed, Creed could not locate Cardoza to dissuade him from moving, let alone to serve a subpoena. Because the prosecutor established Cardoza "would not listen to reason about staying in the area," we conclude the trial court properly determined Cardoza was unavailable and therefore properly admitted his preliminary hearing testimony. There was no error.

B. *The Trial Court Properly Admitted Testimony Concerning a Charged Robbery Involving Corona as a Predicate for the Gang Enhancement against Rodriguez*

Rodriguez contends the trial court erred by permitting the jury empanelled to determine his guilt to hear evidence of Corona's robbery of methamphetamine from Garza. The trial court admitted evidence of the robbery not only as to Corona's guilt, but also as one of at least two predicate acts necessary to establish CVLS was a criminal street gang engaged in a "'pattern of criminal gang activity'" (§ 186.22, subd. (e)), a prerequisite to establishing the gang enhancement against Rodriguez (§ 186.22,

subd. (b)). The trial court allowed Munoz to testify, in front of both Rodriguez's and Corona's juries, to his eyewitness view of the Garza robbery, his account of having his face slashed in prison, and his explanation that, among gang members, slicing someone's face marks him as a snitch.

Rodriguez renews his contention, raised below, that Munoz's testimony was gratuitous and therefore more prejudicial than probative (Evid. Code, § 352) because the prosecutor introduced more than the minimum two offenses committed by CVLS gang members necessary for the gang enhancement. But the statute expressly provides the prosecutor may prove "two or more" predicate offenses to establish the gang's pattern of criminal activity. (§ 186.22, subd. (e).) Rodriguez identifies neither the number of offenses the prosecutor introduced, nor a number Rodriguez contends is excessive; nor does he cite any caselaw or other authority suggesting what number may be excessive. Consequently, his argument is vague, unsupported, and impossible to evaluate. (Cal. Rules of Court, rule 8.204(a)(1)(B); further rule references are abbreviated CRC [appellant must "support each point by argument and, if possible, by citation of authority"].) We agree with trial counsel's hypothetical argument for exclusion "when People want to introduce 15 predicates," but the record does not suggest that is the case here.

In any event, of all possible CVLS criminal activity predicates, the trial court properly admitted Munoz's testimony because it served a dual purpose. It not only established a predicate criminal offense but also, as foundation illustrating Munoz's cooperation with authorities, powerfully corroborated the gang expert's testimony that witnesses to gang crimes often refuse to testify or change their stories because they fear retaliation. The trial court therefore reasonably concluded the evidence was probative

and not prejudicial within the meaning of Evidence Code section 352. (*People v. Karis* (1988) 46 Cal.3d 612, 638 [“‘“prejudice”’” in § 352 not synonymous with “‘“damaging”’”].) Accordingly, the trial court did not err in admitting Munoz’s testimony.

C. *Substantial Evidence Supports the Gang Enhancement Against Corona*

Corona challenges the sufficiency of the evidence to support the gang enhancement the jury found true on the two robberies he committed. Section 186.22, subdivision (b)(1), provides for an enhanced sentence where the defendant commits a felony “for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . .”

Consistent with our limited vantage point and circumscribed role on appeal, we must view the evidence disclosed by the record in the light most favorable to the judgment below. (*People v. Elliot* (2005) 37 Cal.4th 453, 466.) The test is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt. (*People v. Crittenden* (1994) 9 Cal.4th 83, 139.) We presume in support of the judgment the existence of every fact reasonably inferred from the evidence. (*Ibid.*) That the circumstances could be reconciled with a contrary finding does not warrant reversal of the judgment. (*People v. Bean* (1988) 46 Cal.3d 919, 932-933.) Consequently, a defendant attacking the sufficiency of the evidence “bears an enormous burden.” (*People v. Sanchez* (2003) 113 Cal.App.4th 325, 330.)

Corona claims the evidence demonstrated only that he robbed Cardoza and Garza to support his personal methamphetamine habit. We disagree. Corona robbed Cardoza in concert with Rodriguez. “Commission of a crime in concert with known gang

members is substantial evidence which supports the inference that the defendant acted with specific intent to promote, further or assist gang members in the commission of the crime." (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 322.) Based on the joint appearance of Rodriguez's and Corona's monikers in gang graffiti, which the gang expert explained only CVLS members would dare inscribe, the jury could reasonably infer the pair knew of each other's gang affiliation. The jury could also infer as much from the robberies the pair committed together. (See *People v. Meza* (1995) 38 Cal.App.4th 1741, 1746 [jurors may reasonably infer knowledge of the criminal enterprise other perpetrators allow defendant to participate].)

The jury also could reasonably infer the brazen daylight robbery benefitted CVLS by instilling fear in the community, which the gang expert explained solidifies a gang's claim to territory. The same is true with respect to the Garza robbery, which, perpetrated in front of CVLS gang member Munoz, demonstrated CVLS's control of the drug trade in Home Gardens. Thus, Corona's substantial evidence challenge is without merit.

D. *Substantial Evidence Supports the Gang Gun Use Enhancement Against Corona*

Corona challenges the sufficiency of the evidence to support the gun use enhancement the jury found applicable under section 12022.53, subdivision (e)(1). That subdivision provides for imposition of a 10-year sentence enhancement for "any person who is a principal in the commission of an offense if both of the following are pled and proved: [¶] (A) The person violated subdivision (b) of Section 186.22. [¶] (B) Any principal in the offense committed any act specified in subdivision[s] (b), (c), or (d). (§ 12022.53, subdivision (e)(1).) On the latter requirement, the jury found subdivision (b) applied: "Notwithstanding any other provision of law, any person who,

in the commission of a felony specified in subdivision (a) [including robbery (§ 211)], personally uses a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 10 years." (§ 12022.53, subd. (b).)

Corona contends section 12022.53, subdivision (e)(1), is only applicable to aiders and abettors, exposing them to enhanced, vicarious liability for the direct perpetrator's gun use. Corona's theory is that a vicarious arming enhancement should not apply to him because he was armed personally, not vicariously. Under Corona's theory, no evidence supports imposing *vicarious* liability on him because there was no evidence his coperpetrator Rodriguez used a firearm. Corona's theory is fatally flawed.

Subdivision (e)(1) by its terms applies not only to aiders and abettors but to "any person who is a principal" (§ 12022.53, subd. (e)(1)), which includes both direct perpetrators and aiders and abettors. (See §§ 30 & 31 [distinguishing between principals and accessories, and defining former to include *both* direct perpetrators and aiders and abettors].) Because Corona — as a personally armed direct perpetrator — was a principal, the jury properly found both subdivision (b) *and* subdivision (e)(1) applied. Consequently, the trial court was not required to strike either enhancement for lack of evidence or any other reason. (*People v. Gonzalez* (2008) 43 Cal.4th 1118, 1129, original italics [staying, rather than striking, seemingly superfluous enhancement serves legislative goal of making alternate enhancement "*readily* available" if other is reversed on state or federal appeal]; see § 12022.53, subd. (h) [barring trial court from striking § 12022.53 firearm enhancements].) Thus, the trial court properly stayed the subdivision (b) enhancement. (*Gonzalez*, at p. 1129.)

E. *The Trial Court Did Not Err in Instructing Jury on Aggravating Factors*

Rodriguez argues the trial court erred in instructing the jury, if it found him guilty of the substantive crimes, to determine whether certain aggravating factors applied.[1] Specifically, those factors included: whether Rodriguez engaged in violent conduct posing a serious danger to society (CRC, rule 4.421(b)(1)); whether the crime involved great violence or disclosed a high degree of cruelty, viciousness, or callousness (CRC, rule 4.421(a)(1)); whether Rodriguez induced a minor to participate in the crime (CRC, rule 4.421(a)(5)); whether he committed the crimes in a manner demonstrating planning, sophistication, or professionalism (CRC, rule 4.421(a)(8)); and whether the victims were particularly vulnerable (CRC, rule 4.421(a)(3)).

The trial court instructed Rodriguez's jury: "This is the *Cunningham* instruction. In addition to the crimes charged in the Information[,] the People have alleged one or more additional facts. The defendant has denied the truth of these allegations. You must *first decide the question of whether the defendant is guilty of the crimes charged*. [¶] If you find the defendant not guilty as to the crime charged in the Information, it will not be necessary to determine whether the alleged additional facts are true. [¶] If you find the defendant guilty of one or more of the crimes charged in the Information[,] you must determine whether each alleged additional fact is true." (Italics added.)

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[1] Corona waived the option suggested by the prosecutor of having the jury decide the aggravating factors. Corona elected instead to have the trial court determine these issues. Juror determination of aggravating factors was unnecessary because, by the time of trial, the Legislature amended California's determinate sentencing law in response to *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*) to permit the trial court to impose an upper term sentence without such findings. (See § 1170; Stats. 2007, ch. 3, § 1, pp. 2-3 [Sen. Bill No. 40], eff. Mar. 30, 2007.)

The trial court also instructed the jury: "Do not let bias, sympathy, prejudice or public opinion influence your decision. [¶] You must reach your verdict without any consideration of punishment." Additionally, the court instructed the jury to "[p]ay careful attention to all of these instructions and consider them together."

The jury found Rodriguez's robbery victims were particularly vulnerable, that the robberies showed planning, sophistication, or professionalism, and that Rodriguez engaged in violent conduct posing a serious danger to society. The trial court nevertheless imposed midterm rather than upper term sentences for each of the robberies.

Rodriguez contends the trial court's charge to the jury to determine the aggravating factors tainted the jury's determination of guilt with improper consideration of the severity of the charged crimes and sympathy for the victims. Rodriguez suggests the trial court should have "expressly told the jury it could not consider the factors in aggravation unless all guilt issues had been finally determined." Appellate counsel overlooks that the trial court instructed the jury just as counsel suggests. As noted *ante*, the trial court instructed the jury that, before reaching the aggravating factors, "You must first decide the question of whether the defendant is guilty of the crimes charged."

In her reply brief, counsel suggests the jury should have been more forcefully "informed that *any* consideration of *Cunningham* factors was *forbidden* in the context of guilt deliberations." (Original italics.) But this injunction is no more than an italicized restatement of the instruction given, wholly unnecessary because "we presume the jury 'meticulously followed the instructions given.'" (*People v. Cruz* (2001) 93 Cal.App.4th 69, 73; see also *People v. Martin* (1983) 150 Cal.App.3d 148, 158 ["We assume jurors are intelligent persons capable of understanding and correlating jury instructions"].) Counsel also suggests special exhortation was necessary because it

"cannot be known whether the single instruction that informed the jury to consider guilt first ever went into the jury room in written form." The trial court, however, unequivocally informed the jury: "I'll give you a copy of the instructions. It's the Court's copy. [I]t's the one I've been reading off of. Please do not mark these up. You have got the exact same thing [in] your own notes. You can mark those instructions up. Please don't mark these up." Consequently, the challenge is without merit.

Tacking slightly, Rodriguez suggests a special instruction was necessary because the prosecutor emphasized the immigrant victims' vulnerability in closing argument. But the trial court instructed the jury that if the attorneys' comments "conflict with my instructions, you must follow my instructions." We presume the jury followed the court's instructions, not the arguments of counsel. (*People v. Clair* (1992) 2 Cal.4th 629, 662-663.)

Rodriguez also argues submitting the aggravating factors to the jury invited the jury to consider matters outside the record and beyond the jury's expertise. Counsel, however, failed to identify this issue separately and it is therefore forfeited. (CRC, rule 8.204(a)(1)(B) [each brief must "[s]tate each point under a separate heading or subheading summarizing the point"].)

On the merits, the argument is unpersuasive. Counsel suggests that deciding the aggravating factors required the jurors to refer to a vague, undefined notion of "average" cases outside the record "in order to determine whether the case at hand falls above or below that standard." According to counsel, the jurors were thus commanded "to draw on experience they simply did not have" "to make judgments that require the legal experience and sophistication of a practitioner of criminal law." But of the factors the jury found true, it is within a layperson's ken to determine whether a crime

is "violent," poses a "serious" danger, involves "particularly vulnerable" victims or "planning, sophistication, or professionalism." These are all judgments of degree, no different in nature than determining whether a particular injury amounts to "great" bodily injury, which is manifestly within the ability of jurors to determine. (See, e.g., *In re Mariah T.* (2008) 159 Cal.App.4th 428, 436-438 ["'great bodily injury,'" "'serious physical harm,'" and similar determinations of degree are properly submitted to jury as within ability of persons "of common intelligence" to distinguish].)

True, some of the instructions on aggravating factors asked the jury to determine whether the manner in which Rodriguez committed the robberies was "worse than other similar crimes." But, in context, it is clear the reference was not to a storehouse of knowledge of actual, historical "similar crimes" outside the record, but rather, as the trial court specified, to "other ways in which such a crime could be committed . . . ." The trial court instructed the jurors on the elements of robbery, and it was therefore well within their ability to contemplate different possible ways the elements could be satisfied and determine whether the manner in which Rodriguez committed the robberies was "violent," posed a "serious" danger, or was otherwise aggravated in nature. Consequently, even assuming arguendo Rodriguez's challenge is not forfeited, it is without merit.

III

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

SILLS, P. J.

FYBEL, J.